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DOCTRINE OF LIBELS,

AND INFORMATION *EX OFFICIO*,

WITH A VIEW OF THE

CASE OF THE DEAN OF SAINT ASAPH,

And an Enquiry into the Rights of Jurymen,

IN A

LETTER

TO THE HONOURABLE

THOMAS ERSKINE.

BY M. DAWES, Esq.

— Tenax propositi.

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L E T T E R

TO THE HONOURABLE

T H O M A S E R S K I N E,

&c. &c. &c.

S I R,

AFTER the many able discussions that have been published on the subject of libels, by men distinguished as well for their professional talents as their love of liberty, it may seem a work of supererogation in me, to add to their number. But as, in my opinion, the writers and speakers, on both sides the question, have drawn in opposite directions, and avoided the medium, by which each would have come to the point, I

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know of no opportunity more favorable than the present, to fix the public attention on what appears to me, after mature consideration, to be every way sophistical, deceptive and fallacious, in regard to the doctrine of libels.

And, Sir, favorable as this opportunity is, I feel a pride and a pleasure, that from the firmness of your conduct, as Counsel for the Dean of St. Asaph, in a prosecution against him for the *publication* of a supposed libel, a field has been opened, in which the unprejudiced and unshackled may dare to range, unawed by authority, and without the fear of reproach or danger. For you have steadfastly opposed the folly of the construction of a libel, and rendered it additionally ridiculous.

I am old enough in the profession to recollect, with a mixture of pleasure and pain, almost every thing that was said in the cases of Wilkes, Woodfall, Almon, and
Horne ;

Horne ; and though it would be an indecency which I should be very sorry to be suspected of, were I to arraign the arguments that were maintained by Counsel against those defendants, I cannot help declaring, that it is not their joining in the practice of a court, which only reverberates their words, the former becoming the eccho of the latter, that can defeat their opponents, or make that practice shameless, in the minds of a free and enlightened people. However fallacious the doctrine of libels may intrinsically be, when examined with care and precision, those Counsel whose duty it has been to do the most in their power for their prosecuting clients, are uncensurable for having argued agreeably to modern maxims, laid down by the criminal court.

But, regardless of their conduct in the case of a libel, I mean to unravel the inglorious system which has so long prevailed, and in an Address to a Gentleman,

who has made himself so great a master of the question arising out of it, as you have done, to offer the Public the best picture the subject affords, of the deformity of that law logic, which, though high-sounding and technical, disgraces our freedom, and affrights our understandings.

The doctrine of libels was first practiced among us in that accursed court, the Star Chamber, grounded on the principles of the imperial, or more properly called the slavish law. Nothing appears of it in our books, beyond the days of Elizabeth, and Sir Edward Coke; but enough is since to be found in them, down to the trial of the Dean of St. Asaph, to glut the patience of the most moderate reader, and sicken him with the effects.

Although, in some few instances, Judges have differed in opinion upon it, some contending that proof should be given of the *falsity* and *malice* of the writing, and publishing,

publishing, before the writer, or publisher, can be found guilty; others that such proof is unnecessary, they have uniformly agreed, that the criminality of a libel is *exclusively* in the judgment of the law. In the case of the Seven Bishops, Judge Powell contended for the former, against three of his companions; and Judge Holt always, when trying a libel, is said to have asked the defendant, whether he could prove the *truth* of what he had written. The *truth*, therefore, of the writing, and the *innocence* of the writer, were considered by those Judges as an answer to the charge, of which a defendant was then entitled to an acquittal. But subsequent Judges have held the contrary, inasmuch that when a Jury have, from *evidence and conviction*, been disposed to find neither *malice* nor *falsity* in the writing published, they have been told from the Bench, that they had nothing to do with that; for that they were only to find the fact of writing, or publishing. Many a man
has

has consequently been found *guilty* of a libel, though innocent of a *crime*, the language of the verdict being different to the Jury's meaning, that is to say, that the defendant *maliciously* and *seditiously* wrote or published a certain *false*, *wicked* and *scandalous* libel against the peace, &c. In this way law and fact were divided, though inseparably blended together, as no fact of publishing what is not *false* or *malicious*, with an *evil* intent, can be illegal or criminal, except in the judgment of the law, which interdicts a Jury from trying the truth, or falsity, or evil tendency of the writing charged to be a libel, to which the defendant's plea of not guilty, is solely directed, and not to the fact of writing or publishing, which he is ready to admit on his trial, without giving the Jury the trouble of finding it for him (of which more hereafter.)

This separation of the law from the fact, and the reservation of the former for the judgment of the criminal court, with,

with, or without a special verdict, has long been a convenience to the prevailing Government, to the injury of innocence, and in contempt of truth, with all that speculative knowledge which is calculated to open the minds of men, and pave a way to reformation ; but, thank God, violent as this assumption of power is, and terrific as it is intended to be, we have not wanted intrepidity to risk its execution, before Juries who have been wise enough to prevent it, by finding the best and truest of all facts, Not Guilty, in a case where no guilt was to be found.

The modern doctrine of libels might have been, in a degree, accountable for in perilous times, while the Judges were dependant. A love of their office, its honors and emoluments ; a reigning in fear instead of the hearts of the people, might have made them to incline in favor of a court and administration. But that since their independance, and the glorious security the Revolution established, they

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should continue to do so, is alike obstinate and shocking.

As if the prerogative of reserving the law on libel, or no libel, were matured into a certainty, and never to be altered, we find it laid down in our most modern law-books, that with respect to its essence, it is immaterial whether it be *true or false*, it being the *provocation*, and not the *falsity* of it, that makes it criminal, as tending to a breach of the peace*; but as I have never been accustomed to take any thing upon credit, on the authority of great names, however specious their arguments, I have considered the subject in a very different way: Unlike those readers who dip into law-books, and are governed by every thing they read in them, I have never doubted, that if the doctrine of libels were to be solemnly attacked, it would be impossible to support it.

On

* It is among the errors in that admirable book by Sir W. Blackstone, that a libel is supported with great ingenuity, though contrary to the spirit of justice.

On all sides, and according to all our professional breviaries, a libel is defined to be, any writing of an immoral or illegal *tendency* to break the peace. The word libel is only applicable to what tends to do this, which is the reason assigned by the deluded admirers of the modern doctrine, for making it immaterial whether it be *true* or *false*. Accordingly, when the writing, or publishing, is proved, the criminal court pronounce its guilt.

Now, it requires no uncommon degree of human sagacity to shew, even under the commonly received definition of a libel, that it is never proved to be so on the trial, agreeably to the spirit of the definition itself. This is solely left to the criminal court, who are Judges and Jury also upon it; and how, at best, any thing can be criminal that only *tends*, and that by mere *discretionary construction*, to a breach of the peace, I own I could never conceive. No lawyer in his senses, I believe, has yet, by any subtle refinements,

ments, deemed mere authorship to be an *actual* breach of the peace ; and if he think it *tends* to it, from any supposed provocation, it is surprizing we have not more prosecutions for libels than we have, as scarce a day passes but the press is delivered of what, perhaps, in some lawyer's brain or other, may be deemed a *provocation*, and, of course, a *tendency* to break the peace, and ultimately a libel. The fact is, that mere authorship, or publication, is only actionable in a civil sense, between man and man, when scandal and defamation are the consequences. Here is a wrong and an injury *actually done*, without force ; without a breach of the peace, or even any other *tendency* to break it, than what, under the idea of *provocation*, whether the words be true or false, would make it criminal and libellous, as well as scandalous and defamatory. The old common law knew of no remedy for slander, or a libel, but a civil one, by special action for damages, to be found by a Jury. A public libel
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was a non-entity, and it was not till Richard the Second's time, that the defamation of Peers and great men was punishable by Statute. Before then, no mere words were actionable, unless accompanied with some special damage; and after a public libel came into fashion, Lord Coke himself tells us, that *slander* is no breach of the *bono gestu*. Though, says he, it be a *mediate* provocation for a breach of the peace, it is not *immediately* so, like a challenge. The same great authority assures us further, that *sedition* cannot be committed by *words*, but by some *violent act*. Therefore, unless the people submit to any men, or any measures, to a degree of passive obedience, the reigning notions of libels must appear to them arbitrary and oppressive.

With respect to private scandal, the same is very properly punishable by damages; because, in a settled state of Government, under which every free man lives by his *credit* and *good name*, no one
ought

ought to injure another by slanderous words. We should appeal to justice for every wrong done, and not hold the scale ourselves, it being the very essence of the civil polity, that justice shall be equally dealt out, under the voice of the united whole, and not that individuals shall assume it to themselves, and vindicate their injuries as in a state of uncivilized nature. But though he exert a laudable right of examining into the merit of Government, or the goodness or badness of its administration, if he do it with decency, humility and moderation, the case is widely different from the slander of a private man. The Government of our Country is in a variety of hands, and to speak of it, however freely, if with a view to preserve the constitution, cannot be criminal towards it, the Ministers, who are the servants of the public, having no right to sue for punishment, when they have received no damage.

However,

However, as the law is clear that truth may be pleaded in bar to a civil action, because there is no defamation in it, though it may *tend*, in its *provocation*, to break the peace, for which it is then thought to be an indictable offence, it appears to me to be indisputable, any where, but with criminal Judges, and King's Counsel, acting as such, that the truth of the writing should be conclusive, since to truth alone do we owe the Revolution, the present settlement, and all that is dear to us. If the old common-law method of indicting for a libel were, on all occasions, to be adopted, and a Grand Jury knew their duty, they would be competent to judge whether any given writing were destructive of the State's welfare or not; and if also the mode of proceeding by information, in the King's Bench, filed by an Attorney General, were entirely destroyed, the constitution would no longer be disgraced by it, and every man would resort to a Grand Jury, as well to punish a supposed libeller of the Government, as of an individual.

Unfortunately, upon the dissolution of the court of Star Chamber, wherein informations were the ordinary engine, the King's Bench revived their use, as the *custos morum* of the nation; but Sir Matthew Hale, who presided in the former court, was no friend to them, because he knew the ill use that had been made of them, by permitting the subject to be harrassed, whenever applied for, by revengeful prosecutors. Yet their use remained, even after the stat. Ch. I. sec. 10, which destroyed that court, and until the 4 and 5 W. and M. sec. 18, when, to soften the public clamors, it was enacted, that the King's coroner should not file any information, without express direction from the court of King's Bench, and that every prosecutor, permitted to inform, should give 20l. bail, to prosecute with effect, and pay costs, if defeated or non-pross'd, unless the Judge should certify sufficient cause for prosecuting. Soon after the accession of King William, and notwithstanding this act, the Attorney
General

General was at liberty, in all cases *against the King*, to file his information *ex officio*. So that these proceedings, one for offences against the King, the other between subject and subject, have broken in upon the province of a Grand Jury, and rendered their interference altogether unnecessary, under the strange idea that when the court was *sufficiently assured* that a man had committed an offence, by the Attorney General, which he suggested *ex mero motu* on the roll, or by the Coroner, by its direction, he was justly put upon his traverse. The Attorney General and Coroner, with the concurrence of the court, thus became separately a Grand Jury, in all criminal cases not capital, though directly contrary to Magna Charta, which says, no man shall be adjudged but by his Peers. Sir Matthew Hale informs us, that the most regular and safe way, and consonant with Magna Charta, is to prosecute criminal cases by indictment, or presentment of twelve men *sworn*: But Sir W. Blackstone goes fur-

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ther, and referring to Hawkins, p. c. 120, says, as to those offences in which informations were allowed, as well as indictments, so long as they were confined to this high jurisdiction, and carried on in a legal and regular course, in the King's Bench, the subject had no reason to complain. Certainly a subject had no reason to complain of what was *legal* and *regular*. It is what is *illegal* and *oppressive*, that is obnoxious, and ought to be annulled, such as informations *ex officio*, filed by an Attorney General, who, paying no cost, has it in his power, at any time, to harass a man, by putting him to great expence, and then, for want of evidence, to enter a *nolli prosequi*, as was the case, by a certain Vice Chancellor of Oxford.

So flimsy is the word libel, that every writing is charged to be one, in the information by an Attorney General, and the criminal judges claim the power to decide, whether it be so or not. The trial, therefore, by a Jury, is only had
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for form sake, since, in reality, there is no difference, whether they be impannelled or not, the fact of writing, or publishing, seldom or ever coming in question, though proved on trial, out of mere ceremony, as a ground for the criminal court to determine, on the face of the record, whether either be criminal, which can as well be done on a demurrer to the information, in every case where the fact of writing, or publishing, is admitted.

But, after all the mischief that has been experienced by the doctrine of libels, and informations *ex officio*, it requires only to look into the nature of each, to be satisfied that a Jury have a right to determine the one, and that the other is unconstitutional. We have already seen this, in regard to the latter, and I now come to consider the former, as well in a positive, as a relative sense.

The common definition of a crime, I take to be an *act* committed against some
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known

known law, or rule of right and wrong, accompanied with *a public or a private injury*, for which punishment or redress is prescribed. Where there is no injury, there is no crime. All offences are either civil or criminal. The former between individuals, the latter against the Public. Every injury between man and man, by the spirit of the common law, without any specific description, has its remedy. Every breach of public justice is known and limited, consequently, in every suit or prosecution for an infraction of public or private justice, the fact complained of, or indicted, is first described, and then applied as injurious or criminal, under some general or particular rule of law. As the spirit of the common law, or *lex terræ*, redresses every private injury, so, in virtue of the criminal code, a *crime* must be *committed*, before punishment can be lawfully pronounced. If, for example, a libel were described to be a criminal *act*, either by statute, or known to be so, by antient custom, like the act of extortion,

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which is criminal by the common law, it would then be punishable. But the difficulty to be encountered is, how any writing, or publishing, can be deemed so, in any sense but a *defamatory* one, for which damages may be recovered. Tho' termed a libel, it is never pretended to have broken the peace, but only that it *tends* to break it, yet we have long heard, *ex cathedra*, that the crime of a libel, or words written, or published, is the sole consideration of the law, though neither the common law, statute law, or *lex terræ*, has described it criminal.

It is obvious then, that a man is first prosecuted for a crime, *undescribed* as such by any *positive* rule, and when convicted of what he confessed on his trial, the writing, or publishing, the law then, and not before, contrues it criminal, from its mere *tendency* to break the peace, under particular averments; so that every *tendency* to break the peace, collected and drawn from such averments, is left to
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the consideration of the law. Undoubtedly, *preventive* justice is of every kind the most to be admired, but though its operation be very censurably neglected, in all those cases where the magistrate, instead of keeping a watchful eye on the idle and vagrant subject, according to the spirit of the law, established as well for the good of the able and impotent poor, as the community at large, it is notorious that such preventive justice cannot take place at all, in a case where there is no guilt, or at most, where the only guilt is a *tendency* to break the peace, in the construction of the criminal Judge, who considers it, not *jus discere*, but *jus dare*, as a misdemeanor, there being no *overt* act committed against Government, to constitute it treason, the highest offence in civil society ; and because there is no act, that ideal creature of the criminal law, a libeller, is punished for nothing, unlike every other delinquent in misdemeanors, who are never punished but for some act wilfully done.

Arson,

Arson, for example, is an offence against the possession of another, by burning down his property ; but if a man burn his own, so as palpably to endanger his neighbour's, the criminal *intent* is drawn from the act itself, and being unlawful, all its consequences are the same. It is otherwise, if that property be so situated, that such unlawful consequences cannot arise, because a man may do what he will with his own, so as he do not injure another. Therefore, though it be not arson to burn one's own, the law classes it among misdemeanors, when the situation of it is such, as the original burning of it, *wilfully, may* burn the property of another near it, whether it do, or do not. Now, here is an act done to constitute it a misdemeanor ; while a convicted libeller has done no act whatever, but of writing, or publishing.

In a civil sense, an *assault* without a battery, is actionable ; but in criminal matters,

ters, the peace must first be broken, or in positive danger of being so, by *solemn oath*, before the magistrate can exact security for keeping it, by way of prevention; and in the case of vagrancy, the suspected vagrant cannot be deprived of his liberty, unless, on his apprehension, he be unable to give a lawful account of his way of living. It should seem, therefore, for a moment, that a Jury, not being magistrates, cannot try a *tendency* to break the peace, because they cannot demand security for keeping it. How preposterous then, does the doctrine of libels appear: First, They are not known to the common or statute law, nor prohibited as a *specific crime*. Second, Their criminality, which consists only in *tendency*, is the sole consideration of the law. Third, The law, in considering them thus criminal, punishes a man for what he has *not* done, namely, an act of open violence. Fourth, If the Jury consider their *tendency* to break the peace, it is *not* within their province. And lastly, If
they

they do not consider the writing published as *harmless*, they, under all the averments, leave a man to the mercy of the criminal court. For by finding only the fact of writing, or publishing, they find him guilty of what is not criminal, and he is punished in return, notwithstanding the truth of his plea of not guilty, which goes wholly to the criminal charges in the indictment, and not to the fact of writing, or publishing.

If, nevertheless, it be asked, what a Jury should consider and find, in a case of this sort, I should answer, that if upon a full review of the writing, they should be of opinion it is *well intended*, and that it contains nothing *infamous, false, malicious, or scandalous*, they should find not guilty, without any consideration on *the tendency to break the peace, or otherwise*. Their general verdict of not guilty, acquits the defendant of the charge indicted, that is to say, that he did not write, or publish, any thing *falsely, maliciously,*

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licitously, or against the peace, notwithstanding the averments may charge the contrary. If they have a right to find a general verdict (and there is no law to the contrary) a verdict of not guilty, means that the defendant did not write, or publish, with an *evil* intent, or the intent stated in the indictment, which, on the contrary, being entirely before them for trial, if they find him guilty, they find him criminal, in manner and form as charged ; and it is not in the power of the King's Bench afterwards to determine him to be otherwise, because the determination of the Jury is full and conclusive. It finds the fact and crime, such as it is, namely, a malicious and scandalous falsehood, written and published with an evil intent, which can never be proved by witnesses. Facts only are admitted to be proved, and the Judge and *Jury* are from those facts to determine, with what intention they committed. But as my Lord Hardwicke said, in 1736, on a certain smuggling bill, no Judge or Jury can ever, by
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our laws, suppose, much less determine, that an action, innocent and indifferent in itself, was attended with a criminal or malicious intention. One of the great barriers for the liberty of the people is, that every man is presumed innocent, till the contrary appear by some open act of his own, and that act must be in itself unlawful, and of such a nature, that no innocent construction can be put upon it. In our laws, we have no such thing as a crime by implication, from whence, as the guilt of a libel is wholly implied, under the consideration of mere tendency to break the peace, where the thing itself is innocent and indifferent, a writing, unless false, malicious, and mischievous, is no crime at all.

In an action for words, it is possible a Jury may find for the plaintiff, with damages, and that their verdict shall not be good, because the words, by law, may not be actionable. Here the law considers the injury, while crimes are, or ought

to be marked out, so that the law should accompany the fact, and go to a Jury, who, in all cases, civil as well as criminal, have an inherent right to find a special verdict, if they please, whenever they doubt that the fact and law do not correspond. The matter in issue is, whether a defendant is, or is not guilty, in manner and form as he is indicted, and this the Jury are sworn to try. But when it is of such a nature, as no action, indictment, or information, will lie for it singly, and it is worked up, by *aggravations*, into a crime, such as, a paper was written, or published, with *intent* to raise tumult, which is never asserted to have *broken*, but only to be *against* the peace, then some *overt* act should be proved, otherwise the Jury are bound to find the defendant not guilty*.

Mr. Bearcroft, that honest and candid lawyer, whose conduct, in the cause
against

* See Mr. Hawles' Treatise on the Duty of Petty Juries.

against the Dean, as on every other occasion, does him honour, said almost as much as this in declaring, while shewing cause against a new trial, that the Jury had a right to find a general verdict. If they have, and no one, in propriety of speech, can deny it, the implication is, that by finding not guilty, they blend law and fact together, and say the defendant is innocent of all the criminal part of the charge. *They deny the guilt*, though the fact of publishing be *proved*, which they would not do, but in a case where no crime is committed. By finding a general verdict of not guilty, they do no more than what Mr. Bearcroft, and Mr. Justice Willes after him, said they had a right to do, notwithstanding the former gentleman, on the Dean's trial, urged, by a kind of contradiction, that the law and fact were distinct in a libel, as much so as on the trial of an ejectment, where he justly instanced, that a Jury had nothing to do with the operation of a fine, in the deduction of a title. An ejectment is a trespass,

trespass, and not a crime. On the trial of all civil injuries, a Jury have only to find the wrong, and give damages for it ; but on the trial of all crimes, they are to find them committed, or acquit the defendants. Every crime is a fact, and every day's experience convinces us, that for new crimes, of human institution, a Jury are often obliged to find specially, because a doubt is started to them by the criminal Judge, whether the facts proved amount to the crime prohibited by law, which is then free to consider how far they do, or do not, independent of the Jury, who discharge their consciences by finding the facts proved only.

I flatter myself, I need say no more, in proof that a Jury have a right to consider the inuendos and averments, and determine, libel or no libel, on a general verdict, as much so as they have to find homicide murder, where the *intent* to kill is manifested to them by some act ; and this right ought never to be given up, but with our latest breath.

Let what will be said to the contrary, I am too intractable to think that the question of libel, under every inuendo and averment, does not wholly remain with the Jury, who are entitled to judge whether a paper be *respectful, innocent, candid, decent, instructive, true, and constitutional*, however speculative, independent of any constructive tendency to break the peace, which, for reasons already given, is no crime at all, notwithstanding what any criminal Judge may otherwise say, who, I am sorry to think, is too ready to warp and twist the plain letter of the law, to accommodate it to the inclination of every public prosecutor, instead of dispensing justice, regardless of party or politics.

Judges are bound, by oath, to determine according to the *known laws and ancient customs* of the realm, practised *time immemorial*, but no law or custom exists, that constitutes a libel criminal. It is a badge of slavery, and a creature
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of a Judge's discretion, which is little short of tyranny. As such, it is devoutly to be wished that Juries would always exert their acknowledged right of finding a general verdict of not guilty, where no crime appears, and that Parliament would interpose its authority, to destroy informations *ex officio*, as it did on the misfeasance of two Chief Justices (Keeling and Seroggs *) the one for refusing a verdict of manslaughter, on a trial for murder, given because there was no *malice prepense proved*, the other for discharging a Grand Jury, before they had done their business. Parliament voted the conduct of these men illegal, as it likewise did, in the case of one Topham, a servant of the House of Commons, whose plea, that he acted by their order, had been over-ruled; and having interposed thus, in cases where the *known* law was infringed by the Judges, they are loudly called upon to cure the evil of informations *ex officio*, by their entire destruction.

* See Parliamentary Debates, 1680.

But, anxious as I am to see an event of this kind take place, I would by no means have it understood, that though I think all free enquiry should be encouraged, in politics, as well as very other branch of knowledge, Government should not be secured against its licentiousness. Were any Duke's brother, for instance, to write and publish a pamphlet, setting forth, that the House of Hanover were usurpers of the Crown of Great Britain, and were enemies to Church and State, as by law established, so as immediately to call forth the people to arms, in favor of a pretender. Or if any Ex-Minister, from principle, revenge, or disappointment, should be rash enough to circulate, by means of the press, that the existing Government were an insult to the common sense of freemen, and a violation of all the rules of public right, as reserved in the great plan of the English constitution—I say, if a leading character were to write and publish any thing so inflammatory in itself, as to induce a tumult,

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and an open opposition to all good order, peace, and common safety, the falsity and malice of it would be so palpable, on the first blush, as tried by the true principles of the constitution, and the Revolution, that all who runs may read—and from this falsity and malice, from such a character, may proceed acts of downright rebellion and treason. But neither in the case of Wilkes, Woodfall, Almon or Horne, did I perceive any thing had been written, or published, by any leading character, *falsely* or *maliciously*, so as *immediately* to induce an inevitable insurrection. The North Briton, to be sure, was an attack upon a King's *speech*, penned by a Minister, who felt the lash of it, and repented it. Junius' Letter was a bold piece of declamation, containing too much truth, but expressed with too much familiarity. An Attorney General, therefore, as a sort of guardian of the Royal honor, stepped forward, armed with that breastplate of hope, an information *ex officio*, and in the saving faith of the law's exclusive

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five consideration, that such letter was a libel, he brought the publishers to trial, though without effect, the Jury having negatived the inuendos and averments in the criminal charges, by finding guilty of publishing *only*; and as to the simple advertisement for a subscription in favor of a few American orphans and widows, though very provoking to those Ministers who quitted their posts with our loss of America, and an abundance of treasure and blood, it neither drew the attention of the people, nor, of course, tended to do any public harm. The great mistake of men, in giving their opinions on libels, arises from a nice discrimination of these particulars. Though some writings and publications may be productive of public calamity, that no common reader can misunderstand them, their falsity and malice being so conspicuous, it follows not that others, innocent and indifferent in themselves with the people, however provoking to a Minister, are equally reprehensible, and I defy any man, fond as

he may be of the commonly received opinion of libels, to give an instance, when any writing, or publication, produced, or was even likely, by a common possibility, to produce tumult, disorder, or violence, except in the *apprehension* of those who found a gratification in the prosecution of the writer, or publisher. The truth is, that nine times in ten, a paper is only criminal in the apprehension of the Minister, or the Attorney General, who, countenanced by the supreme criminal court, trusts in the conviction of a man for writing, or publishing it, to punish him for stepping between the governors and the governed, whose servants they are, and making their conduct known for what it really is, and not for having, falsely or maliciously, alarmed the public fear of danger. If nothing be ever found fault with, nothing will ever be amended. By the same rule, if the conduct of Ministers should for ever pass *sub silentio*, the acquiescence of the people will in time lull them into slavery.

To

To their watchfulness, assisted by the true friends of the constitution, do we owe all the blessings of our present liberty. Why then should an Attorney General, or any enterprizer in his fervors to favor a party, contend, and there are many, otherwise able and ingenious men, who do contend, that every paper, taken up as a public libel, deserves the name of criminal, from its mere, though remote tendency to break the peace? As no proof can possibly be brought of this, I could wish never more to hear any Lawyer, young or old, talk of *tendency* as an evil, but that every one will be honest enough to own, that their can be neither crime or misdemeanor without an act, superinduced by an evil and wilful intention. To guard against the commission of crimes, by making mankind better by precept and example, is commendable; but to curb the liberty of the human intellect, to limit human actions, to restrain the human thoughts from being otherwise published than by the faculty

faculty of speech, and to prevent the development of our understandings, for the laudable purpose of benefitting mankind, in all the sciences of the discovered world, is infamous and despotic. Wisdom and virtue are often drawn from error and vice. But if the Magistrate, the Minister, or the Attorney General, are to be the arbiters of our very thoughts, words, and writings, as well as actions, it were high time to leave off thinking, and look out for another system of *jure divino* government, and consider its Ministers perfect and infallible

At all events, I would have no Grand Jury suffer an inflammatory falsehood to pass, unfound by them, as a misdemeanor which *ought* to be punished. The line I mean to draw is, that Judges shall in no case be left to their discretion, but, in the measure of punishment. Judge, Juror, and Executioner, are characters only consolidated in a tyrant. Wretched, therefore,
may

may the people of England expect to be, if ever they suffer themselves to be deprived of the right of finding, by a general verdict, as jurors, the guilt, that is, the criminality or innocence of any paper, prosecuted under the usurped title of a crime. The House of Commons is the place where their complaints should be made against informations *ex officio*, which, though a motion in it to abolish them in 1766, was negatived, may sooner or later be brought to a sense of annihilating them, lest injuries of a greater magnitude should succeed the frequency of their use.

And now, Sir, having held up the deformity, as well of the doctrine of libels, as of informations *ex officio*, which I hope time will correct, give me leave to congratulate you on the success of your laudable zeal, and professional exertions, in the cause of the Dean. They have brought forth a fact of some importance,

portance, in a declaration from the criminal seat of justice, and from the lips of a King's Counsel, acting in favor of a criminal prosecution, that a Jury, on the trial of a libel, have a right to find a general verdict, which, I am of opinion, is as much as to say, if they acquit a defendant, they have a right so to do, although the fact of writing, or publishing, be on all sides admitted.

I am, Sir,

Your most obedient servant,

M. DAWES.

29th November, 1784.

E R R A T A.

Page	10	line	13	for <i>on</i> the read <i>or</i> .
	14	—	10	for <i>be</i> exert read <i>we</i> .
	ib.	—	13	for if <i>he</i> do read <i>we</i> .

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But

But the instruction that may be drawn from SHAKSPEARE is equal to the entertainment which his writings afford. He is the greatest master of human nature, and of human life, that, perhaps, ever existed; so that we cannot peruse his works without having our understandings considerably enlarged. Besides this, he abounds in occasional maxims and reflections, which are calculated to make a deep impression upon the mind. There is scarcely any circumstance in the common occurrences of the world, on which something may not be found peculiarly applicable in SHAKSPEARE; and at the same time, better expressed than in any other author. To promote, therefore, knowledge of him, is to contribute to the general improvement.

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